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Attorneys for Plaintiff
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 01-00078-01 DAE
)	
Plaintiff,)	GOVERNMENT'S OPPOSITION TO
)	DEFENDANT'S MOTION TO
vs.)	DELAY MITTIMUS
)	
GARY WAYNE RODRIGUES,	(01))	
)	
Defendant.)	
_____)	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO DELAY MITTIMUS

The United States of America, through its undersigned counsel, opposes Defendant GARY W. RODRIGUES'S Motion to Delay Mittimus. Defendant requests a further delay of mittimus based on his petition for writ of certiorari which has been or will be filed in the United States Supreme Court and pending civil matters in this Court and in the First Circuit Court of the State of Hawaii. See, Declaration of Eric A. Seitz, in support of Defendant's motion.

PROCEDURAL HISTORY

On June 11, 2007, the Ninth Circuit issued its non-precedential memorandum decision and judgment unanimously affirming all of Defendant RODRIGUES's convictions for mail fraud, health care fraud, conspiracy to launder money, money laundering, theft of union funds and accepting kickbacks from an employee benefit plan. The panel ordered a limited Ameline remand.

On August 21, 2007, the Ninth Circuit entered an order denying Defendant's petition for rehearing en banc. The order noted that no member of the Court requested a vote on the petition.

On August 27, 2007, Defendant filed a motion to stay the mandate pending a petition for a writ of certiorari in the United States Supreme Court. On August 31, 2007, the government filed its Response of the United States in Opposition to Appellant Rodrigues' Motion to Stay the Mandate. On September 24, 2007, the Ninth Circuit denied the motion to stay the mandate.

On October 31, 2007, this Court entered its "Order Affirming Sentence of Gary Wayne Rodrigues and Setting Mittimus." The order directs Defendant to report to the facility designated by the Bureau of Prisons no later than 2 p.m. on January 7, 2008

to permit the Bureau of Prisons time to designate an appropriate facility.

ARGUMENT

The instant motion is yet another delay tactic by Defendant RODRIGUES. His convictions on 100 counts were affirmed by the Ninth Circuit. Pursuant to the limited Ameline remand, this Court affirmed the sentence of the Defendant and ordered that mittimus issue. It is time for this Defendant to start serving his prison term.

The Ninth Circuit panel's memorandum decision in this case was unanimous, unpublished and non-precedential. (Although Fed. R. App. P. 32-1 now allows the citation of unpublished decisions, such decisions remain non-precedential. See 9th Cir. R. 36-3 which provides that although unpublished decisions issued on or after January 1, 2007, may be cited in accordance with Fed. R. App. P. 32-1, such decisions "are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.") Accordingly, even if defendant could identify a conflict between the panel decision and a decision of the Supreme Court or another circuit, the likelihood that the Supreme Court would grant certiorari on any issue in this case would be minimal. See S. Ct. R. 10. Further, the likelihood of reversal is remote. Even if the Supreme Court were to grant certiorari, it is doubtful that the Court would enter

judgment in Defendant's favor, either on the fraud issue he identified in his Motion to Stay the Mandate filed in the Court of Appeals, or on any other question. As established in the government's Ninth Circuit brief (pp. 33-38), any arguable error in the fraud instructions was harmless beyond a reasonable doubt in light of the overwhelming evidence against Rodrigues. See Government Brief 33-38. Further, the Ninth Circuit correctly rejected the other claims raised by both Defendant and Co-Defendant Robin Hainan Rodrigues Sabatini based on settled legal principles.

Lastly, Defendant's presence in a court proceeding can be requested by way of an appropriate Writ presented to this Court.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motion to delay mittimus be denied.

DATED: December 11, 2007, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

/s/ Florence T. Nakakuni
By _____
FLORENCE T. NAKAKUNI
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at his last known address:

Served Electronically by CM/ECF:

Doron Weinberg doronweinberg@aol.com 12/11/2007

Eric A. Seitz eseitzatty@yahoo.com 12/11/2007

Served by Hand Delivery:

U.S. PROBATION OFFICE
300 Ala Moana
Honolulu, Hawaii

DATED: December 11, 2007, at Honolulu, Hawaii.

/s/ Patricia L. Redondo